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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In the Matter of the Conservatorship of
SHIRLEY L. HALBY.

2d Civil No. B209116
(Super. Ct. No. P079655)
(Ventura County)

LEAH HALBY LIGOTTI and HEATHER
HALBY BRINK,

Petitioners and Appellants,

v.

MARK HALBY,

Objector and Respondent.

In 1984 William Halby (William) and Shirley Halby (Shirley) executed an instrument creating the Halby Family Trust (Trust). Leah Halby Ligotti and Heather Halby Brink (appellants) and Mark Halby (respondent) are the children of William and Shirley. Appellants appeal from the probate court's order determining that, because William had died, the petition of Shirley's conservator to amend the Trust was "no longer viable" and respondent's petition for declaratory relief was "moot." We construe this order as a denial of both petitions. The order is appealable pursuant to Probate Code section 1304, subdivisions (a) and (d).¹

¹ All statutory references are to the Probate Code.

Appellants argue that the probate court erred because the proposed amendment of the Trust would relate back to a time when Shirley and William were still living. We disagree and affirm.

Factual and Procedural Background

As amended and restated in 1996, the Trust provided that, upon the first to die, the Trust property would be divided into three separate subtrusts: Survivor's Trust A, Decedent's Trust B, and Decedent's Trust C. Survivor's Trust A would be revocable by the surviving trustor. Decedent's Trust B and C would be irrevocable. After the death of the surviving trustor, the trustors' residence would be distributed to respondent. The residue of the Trust estate would be distributed as follows: 90 percent to respondent, 5 percent to appellant Ligotti, and 5 percent to appellant Brink. The Trust contained a no-contest clause.

In 2006 Sarah J. Hardcastle was appointed conservator of Shirley's person and estate. On October 1, 2007, Hardcastle filed a petition on Shirley's behalf seeking to amend the Trust and execute a pour-over will leaving Shirley's entire probate estate to the trustee of the amended Trust. The proposed amended trust instrument, entitled "Second Amendment and Restatement of the Halby Trust Agreement" (Second Amendment), was attached as an exhibit to the petition. The Second Amendment provided that, upon the death of the surviving trustor, the trust property would be distributed in equal shares to appellants and respondent. The Second Amendment also modified the designation of successor trustees.

As an additional exhibit to the petition, Hardcastle attached a declaration from William, the sole trustee of the Trust. William declared that he approved of the changes made by the Second Amendment and that Shirley would have given her approval had she been competent to do so.

A hearing on Hardcastle's petition was initially set for November 6, 2007. William died on November 10, 2007. After his death, respondent filed a proposed objection to Hardcastle's petition. Respondent also filed a petition for declaratory relief requesting a determination that the proposed objection would not violate the

Trust's no-contest clause. Respondent's petition stated that, in September 2007, William had "allegedly signed" the Second Amendment.

On January 31, 2008, the probate court conducted a hearing on both Hardcastle's petition and respondent's petition for declaratory relief. During the hearing, counsel for appellants asserted that William had "signed the documents [the Second Amendment] during his lifetime." The court took the matter under submission.

A minute order sets forth the probate court's subsequent ruling: "The Court finds that Respondent, Mark Halby's, Petition for Declaratory Relief . . . is moot. Petitioner Sarah Hardcastle's petition for substituted judgment to amend the 1996 trust is no longer viable as William Halby is deceased and the trust can only be amended jointly."

*Discussion*²

The Second Amendment would modify the designation of successor trustees and the distribution of the Trust estate. But upon William's death in November 2007, the Trust estate was required to be divided into three subtrusts, two of which - Decedent's Trust B and C - would be irrevocable. Therefore, after William's death, neither the designation of successor trustees nor the plan of distribution could be amended as to Decedent's Trust B and C.

Appellants argue that the Second Amendment would relate back to when Hardcastle's petition was filed (October 1, 2007) or, in the alternative, to the initial hearing date for the petition (November 6, 2007). Since William and Shirley were both living on those dates and since William signed the Second Amendment before he died, appellants maintain that the Second Amendment would be valid.

² Respondent "has not filed a brief. However, we do *not* treat the failure to file a respondent's brief as a 'default' (i.e., an admission of error) but examine the record, [appellants'] brief, and any oral argument by appellant[s] to see if [they] support[] any claims of error made by the appellant[s]. [Citations.]" (*Riddle v. Riddle* (2005) 125 Cal.App.4th 1075, 1078, fn. 1.)

In determining the validity of the proposed amendment, we look to the 1996 Trust instrument. "[S]ection 15402 recognizes a trustor may bind himself or herself to a specific method of modification or amendment of a trust by including that specific method in the trust agreement."³ (*Conservatorship of Irvine* (1995) 40 Cal.App.4th 1334, 1344.) In *Conservatorship of Irvine* the court held that a purported amendment of a trust was invalid because it had not been properly served on the trustee as required by the trust instrument. (*Id.*, at pp. 1346-1347.)

The 1996 Trust instrument contains the following paragraph on amendments: "The Trustors may, *during the joint lives of the Trustors, by signed instruments delivered to the Trustee*: change the beneficiaries, their respective shares and the plan of distribution; amend this Trust in any other respect; or revoke this Trust in its entirety or any provision therein, except as to any share or Trust created herein which has become irrevocable by the terms hereof or by operation of law." (Italics added.) By including this paragraph in the 1996 Trust instrument, the trustors "provided for the exclusive means by which [they] could amend the Trust." (*Conservatorship of Irvine, supra*, 40 Cal.App.4th at p. 1345.)

There is no extrinsic evidence concerning the meaning of this paragraph. Thus, we are " ' ' 'not bound by the lower court's interpretation but must independently construe the instrument at issue. [Citations.]' [Citations.]" [Citation.] "In construing a trust instrument, the intent of the trustor prevails " ' ' ' (*Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 73.)

The language of the paragraph makes clear that the 1996 Trust instrument could be amended only by a writing or writings signed by both trustors and delivered to the trustee while both trustors were still living. These requirements were not met before William died, and it became impossible to meet them after his

³ Section 15402 provides: "Unless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation."

death. Therefore, as a matter of law, the Second Amendment cannot be validated by deeming it to relate back to the time before William's death when Hardcastle's petition was filed.

Appellants alternatively contend that the Second Amendment would be valid because it would relate back to the initial hearing date of November 6, 2007, four days before William's death. The proffered justification for this relation-back doctrine is that Hardcastle was ready to proceed at that time, but the hearing was postponed pursuant to respondent's "request to obtain a continuance so he could obtain counsel." Appellants do not support this justification with citations to the record. Our review of the record discloses no information about what occurred on November 6, 2007. We therefore disregard appellants' alternative contention. (See Cal. Rules of Court, rule 8.204(a)(1)(C); *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239; *Gotschall v. Daley* (2002) 96 Cal.App.4th 479, 481.) In any event, appellants fail to explain how respondent's request for a continuance, which was apparently made in good faith and without objection, would overcome the obstacle of the 1996 Trust language requiring that an amendment be signed and delivered to the trustee during the trustors' joint lives.

The cases cited by appellants do not support their contention that the Second Amendment would be valid because it would relate back to the filing of Hardcastle's petition or the initial hearing date of November 6, 2007. None of these cases turned on the construction of similar language in a trust instrument or involved similar facts. *Varney v. Superior Court* (1992) 10 Cal.App.4th 1092, concerned the filing of a creditor's claim against an estate. *Voyce v. Superior Court* (1942) 20 Cal.2d 479, concerned the filing of a petition in intervention in a pending will contest. In *Smeltzley v. Nicholson Mfg. Co.* (1977) 18 Cal.3d 932, 939, and *Burgos v. Tamulonis* (1994) 28 Cal.App.4th 757, 763-764, the courts concluded that the filing of an amended complaint related back to the filing of the original complaint, thus avoiding the bar of the statute of limitations. In *Bank One Texas v. Pollack* (1994) 24 Cal.App.4th 973, the court reversed an order denying

the appellant's request to amend a judgment and to relate the amended judgment back to the date of entry of the original judgment.

Finally, in *Battuello v. Batutello* (1998) 64 Cal.App.4th 842, the court reversed a judgment entered following the sustaining of a demurrer. The complaint alleged that, in reliance upon his mother's false promise that he would inherit a vineyard, the plaintiff had not timely filed an action to enforce his deceased father's promise to give him the vineyard. The court held that these allegations were sufficient to support a claim that the mother was equitably estopped from asserting that the plaintiff's action was barred by the statute of limitations. (*Id.*, at p. 848.) Unlike *Batello*, the facts here do not support the application of the doctrine of equitable estoppel.

"An appealed judgment or challenged ruling is presumed correct. [Citations.] An appellant must affirmatively demonstrate error through reasoned argument, citation to the appellate record, and discussion of legal authority. [Citations.]" (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 685.) Appellants have not affirmatively demonstrated error by the probate court in determining that, because William had died, Hardcastle's petition to amend the Trust was "no longer viable" and respondent's petition for declaratory relief was "moot."

Disposition

The order of the probate court is affirmed. Each party to bear its own costs.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

Kent M. Kellegrew, Judge
Superior Court County of Ventura

Oldman, Cooley, Sallus, Gold, Birnberg & Coleman; Marshal A
Oldman and Susan R. Izenstark, for Appellants.

Samuel M. Huestis, for Respondent.